Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL LODGE NO. 875, BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO,
Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals for the Fifth Circuit

C. MARSHALL FRIEDMAN
NEWTON G. McCOY
FRIEDMAN WEITZMAN & FRIEDMAN, P.C.
1133 Pine Street
St. Louis, Missouri 63101
(314) 621-2200
Counsel for Petitioner Local Lodge No. 875, Brotherhood Railway Carmen of the United States and Canada, AFL-CIO

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St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1) Whether the three month time period set forth in 29 U.S.C. Section 482(a)(2), pertaining to exhaustion of internal remedies by a complaining union member, begins to run only upon the member's first invocation of internal remedies following the alleged violation of the Labor Management Reporting and Disclosure Act of 1959.

2) Whether it is error, as a matter of law, to grant summary judgment, when the court has failed, neglected and refused to rule upon pending discovery motions pertaining to relevant and material factual issues sought by the party opposing summary judgment, and has further refused to allow completion of relevant and material discovery which was contingent upon the court's ruling on the aforesaid motions.

3) Whether, pursuant to 29 U.S.C. Section 481, a court may overturn a union's reasonable and consistent interpretation of its own constitutional provisions pertaining to eligibility for union office when the union's action is consistent with regulations promulgated by the Secretary of Labor and the court's action is inconsistent with such regulations.

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PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals for the Fifth Circuit

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Petitioner, Local Lodge No. 875, Brotherhood Railway Carmen of the United States and Canada, AFL-CIO, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 15, 1980, affirming a judgment of the United States District Court for the Southern District of Mississippi entered on September 4, 1979.

OPINION BELOW

The judgment of the Court of Appeals, which was entered without formal opinion, appears as Appendix A, attached hereto, and is reported at 622 F.2d 1042 (5th Cir. 1980). A copy of the order of the Court of Appeals denying rehearing is attached hereto as Appendix B. A copy of the judgment of the

United States District Court for the Southern District of Mississippi, affirmed by the Court of Appeals herein, is attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 15, 1980. Rehearing was denied on September 11, 1980. This Petition is filed within ninety (90) days of July 15, 1980. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS

29 U.S.C. Section 481 (e) provides:

> "(e) Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records. In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 (29 USCS Section 504) and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by

members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title (29 USCS Sections 481-483)."

29 U.S.C. Section 482 provides in part:

Section 482. Enforcement

(a) Filing of complaint; presumption of validity of challenged election. A member of a labor organization-

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (29 USCS Section 481) (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets. The Secretary shall investigate such complaint and, if he

finds probable cause to believe that a violation of this title (29 USCS Sections 481-483) has occured and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title (29 USCS Sections 481-483) and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) Declaration of void election; order for new election; certification of election to court; decree; certification of result of vote for removal of officers. If, upon a preponderance of the evidence after a trial upon the merits, the court finds-

(1) that an election has not been held within the time prescribed by section 401 (29 USCS Section 481), or

(2) that the violation of section 401 (29 USCS Section 481) may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of sec-

tion 401 (29 USCS Section 481(h)), the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

PERTINENT REGULATIONS

29 C.F.R. Section 452.62, promulgated by the Secretary of Labor pursuant to 29 U.S.C. Section 481, provides:

> "**Disqualification of Candidates; Procedural Reasons.** A candidate who is otherwise eligible for office may not be disqualified because of the failure of a union officer to perform his duties which are beyond the candidate's control. For example, the failure for a local recording secretary to perform his duty to complete and forward a condidate's nomination certificate to the district may not be used as the basis for disqualifying the candidate."

29 C.F.R. Section 452.3, promulgated by the Secretary of Labor and applicable to 29 U.S.C. Section 481, provides:

> "The interpretation consistently placed on a union's constitution by the responsible union official or governing body will be accepted unless the interpretation is clearly unreasonable."

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56 of the Federal Rules of Civil Procedure provides:

Summary Judgment

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and suported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

On July 14, 1978, the respondent, Ray Marshall, Secretary of Labor, filed suit against Local Lodge No. 875, Brotherhood

Railway Carmen of the United States and Canada, AFL-CIO, petitioner herein, in the United States District Court for the Southern District of Mississippi. The Complaint alleged that petitioner violated Section 401(e) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 481(e), by denying R.W. Coffey, a member in good standing of petitioner, the right to hold local elective office. The Complaint prayed that petitioner be required to install Coffey as its Local Chairman.

Petitioner, in due course, filed its first amended answer, stating that Coffey was ineligible to hold office due to his failure to satisfy a meeting attendance requirement authorized by Section 401(e), 29 U.S.C. Section 481(e), that the respondent's Complaint was not timely filed, that the prerequisites for the filing of the Complaint set forth in Section 482 had not been met, and that the respondent and his agents acted impropertly and in violation of the Act in the alleged investigation of this matter.

The following is a summary of the relevant facts. References are to the Record on Appeal.

Petitioner held its election of local officers in December, 1977 (143). R. W. Coffey, a member of petitioner union in good standing, was one of the nominees for the office of Chairman of the Local Protective Board (Local Chairman) (73). Coffey received a majority of the votes cast (73). Thereafter, a protest of the election was filed with the International Union, with which petitioner is affiliated, based upon Section 26 of petitioner's Constitution (73). Section 26 provided as follows:

> "Any member who desires to be elected to any office in his lodge, must have attended a majority of the meetings of his lodge in the 12 months immediately preceding the month of election unless unable to attend for just and sufficient reasons. A member shall be required to advise the Recording Secretary in a written statement justifying his absence, and this is to be done in the current month; a ma-

jority vote of the members in attendance to determine acceptance or rejection of the offerred excuse. A record of attendance and excuses for absence to be kept by the local lodge." (49, 66, 76)

Petitioner held nine meetings during the twelve months immediately preceding the election (75, 185). Thus, to qualify under Section 26, a member must have attended five meetings, unless unable to attend for just and sufficient reasons. Of the nine meetings held, R. W. Coffey attended only one, the November, 1977 meeting at which he was nominated for Local Chairman (186). Coffey did not seek excuses for his non-attendance at the other meetings for just and sufficient reasons.

The International's initial response, dated January 31, 1978, to the protest of the election (48, 59, 74), clearly set forth the interpretation of Section 26 which was uniformly and consistently employed in all situations involving Section 26. On February 7, 1978, the International having determined that a member who qualified under Section 26 had been nominated for Local Chairman, ordered the qualified nominee, W. R. Dunaway, declared the newly elected Local Chairman, thereby removing Coffey (48, 60, 74). The International's decision was in accordance with the construction of Section 26 set forth in the letter of January 31, 1978, that if one qualified member is nominated for an office, no unqualified member may be elected to or hold that office. Dunaway had attended four meetings and sought excuses for another two meetings for just and sufficient reasons (185-186), totaling a majority of the meetings held.

Since the date of the election, Section 26 has been applied to the other local offices involved in the election in like manner. The International with which petitioner is affiliated ordered C. T. McDaniel, who was a candidate nominated for Treasurer and who was the only nominee for Treasurer qualified under Section 26, installed as treasurer. An unqualified nominee, T. J. Dickerson, who was initially installed as Treasurer, was removed (74,

186). Further, T. J. McEwen, who was a candidate nominated for Trustee and who was the only nominee for Trustee qualified under Section 26, was ordered installed as one of three trustees. T. V. Taylor, Phil Price and G. H. Smith, who were initially installed as Trustees, but who were unqualified under Section 26 have been removed and new elections held for the remaining two trustee positions (74, 186). F. W. Westbrook, who was initially installed as Secretary of the Local Protective Board, but who was unqualified under Section 26, has been removed and new elections held for Secretary. No qualified nominee had been nominated for Secretary. (74, 186).

On February 22, 1978, a letter over the recording secretary's signature, purportedly on behalf of the membership of petitioner, was mailed to O. W. Jacobson, General President of the International Brotherhood Railway Carmen of the United States and Canada, protesting the removal of Coffey (48, 60, 74).

By letter dated February 27, 1978 the International President denied the protest of February 22, 1978, and advised of the right of appeal from his decision (48, 62, 74-75). By letter of April 10, 1978, over the signature of the Recording Secretary and President of petitioner, again purportedly on behalf of the membership of petitioner, the International President's decision was appealed to the International General Executive Board (49, 63, 75). By letter dated May 3, 1978, the General Executive Board denied the appeal (49, 64, 75). By letter dated May 3, 1978, the International President advised Coffey that the General Executive Board decision could be appealed to the International Convention, commencing July 31, 1978 (35, 105).

Coffey, declining to exhaust the remedies available within the union, did not appeal to the International convention but instead filed a complaint with the respondent Secretary of Labor. Respondent alleges that this complaint was filed May 15, 1978 (2-3, 178), which was less than three months after the letter of February 22, 1978, which protested the decision to remove Cof-

fey. It should be noted that respondent has consistently maintained that the protest within the union was from the decision to remove Coffey dated February 7, 1978 and not from the election itself (174, 178).

It should further be noted that Coffey's complaint to the Secretary of Labor was dated May 11, 1978 (42, 112). The respondent alleged that it was received by the Department of Labor on May 15, 1978 (3, 178). The only indiction on the complaint of the date of its receipt is a handwritten notation by Department of Labor Compliance Officer Sutton (46, 116). All other correspondence produced by respondent which was sent to the Department of Labor shows the time and date of receipt by a Department of Labor ink stamp (119, 129, 132, 133). In answers to interrogatories, respondent stated that Sutton had contacted Coffey on May 11, 1978 (97). Respondent's complaint in this action was filed on July 14, 1978, precisely 60 days after May 15, 1978, the date Coffey's complaint to respondent was allegedly filed. Respondent's complaint was, therefore, filed more than 60 days after May 11, 1978.

Respondent alleged in his Complaint and his Motion for Summary Judgment that it duly investigated Coffey's complaint to the Secretary, allegedly filed on May 15, 1978 (179). Yet, in Answers to Interrogatories, respondent stated that his investigation was complete prior to May 15, 1978 and that no investigatory activities whatsoever took place after May 15, 1978 (173).

Respondent filed his Motion for Summary Judgment in the District Court on August 22, 1980. It was argued to the Court on August 31, 1979. At that time, petitioner's discovery was incomplete.

Petitioner had filed interrogatories (80) and requests for production (87) in this cause. Respondent objected to or failed to fully respond to a number of the interrogatories and requests for production (167). A Motion to Compel (149) was argued to

the Magistrate who compelled discovery as to some items and denied it as to others (165). Petitioner filed a timely application for Review of the Magistrate's decision (167). By agreement between counsel for respondent and petitioner, the depositions of compliance officers Sutton and Lamont Kent were deferred until after the ruling on the Application for Review (182, 195). All of the foregoing discovery matters related to petitioner's contentions concerning the date of the filing of Coffey's complaint with the Secretary of Labor and to petitioner's allegations that the investigation was conducted contrary to law (182-183, 195).

The District Court nevertheless granted summary judgment on September 4, 1979.

The District Court had not ruled on the Application for Review at the time it granted respondent's Motion for Summary Judgment (182, 195). Petitioner, in affidavits in opposition to the Motion for Summary Judgment, set forth the foregoing and stated its desire and intention to complete its discovery. The District Court granted Summary Judgment without ruling on the Application for Review or permitting petitioner to complete its discovery. The judgment ordered petitioner to install Coffey as Local Chairman forthwith (189).

Thereafter, petitioner perfected an appeal to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment per curiam, without opinion, on July 15, 1980.

REASONS FOR GRANTING THE WRIT

Argument

I. The Union Member's Complaint To The Secretary Of Labor In The Instant Case Was Prematurely Filed And Was Therefore Not In Compliance With 29 U.S.C. Section 482. Accordingly, Respondent Could Not Properly Bring Suit Based Upon The Complaint. In Ruling In Favor Of Respondent The Courts Below Improperly Disregarded Clear Congressional Directives As Embodied In 29 USC Section 482.

Section 402(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 482(a), provides as follows:

> "(a) A member of a labor organization - (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide."

The procedure set forth in Section 482(a) is the exclusive means by which alleged violations of Section 481 (as alleged in the instant case) may be remedied. *Calhoon* v. *Harvey,* 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964).

A complaint filed with the Secretary of Labor in accordance with Section 482(a) is a mandatory prerequisite to the institution of an action by the Secretary of Labor. E.g., *Hodgson* v. *United Steelworkers of America,* 459 F.2d 348 (3rd Cir. 1972). In that case, the court stated that unless the complaining union member files his complaint with the Secretary of Labor during the month following exhaustion of internal union remedies, any action filed in the District Court must be dismissed. 459 F.2d at 350.

The requirement of a timely complaint by a union member may be satisfied in either way set forth by the statute. He may file a complaint within one month of the exhaustion of internal union remedies or, if a final decision has not been rendered within three calendar months of the invocation of union remedies, he may file a complaint within one month thereafter.

The purpose of these requirements with respect to exhaustion of internal remedies was stated as follows in *Schultz* v. *Local 1291, International Longshoreman's Association,* 429 F.2d 592, 595-596 (3rd Cir. 1970):

> "The two alternative provisions of Section 402(a) illustrate the distinction between requirements of exhaustion and invocation of remedies. The first alternative is one of direct exhaustion of the remedies available under the union's constitution and bylaws. The second alternative, however, requires only the invocation of available remedies and authorizes resort to the Secretary of Labor, regardless of exhaustion, if the remedies invoked have not yielded a final decision within three calendar months. Both requirements are intended to afford the union an opportunity to hear the complaint of its member and to redress his grievance before he may resort to governmental intervention. Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 472, 88 S.Ct. 643 (1968); Wirtz v. Local Union No. 125, Int'l, etc. Laborers' Union of N. Amer., 389 U.S. 477, 484, 88 S.Ct. 639, 19 L.Ed.2d 716

(1968). The statute thus fosters union self-government and seeks to 'accustom members to utilizing remedies available within their own organizations.' Wirtz v. Local Union No. 125, Int'l, etc. Laborers' Union of N. Amer., 389 U.S. at 484, 88 S.Ct. at 642. The preliminary resort to union remedies has the additional advantage of sharpening issues before they reach the courts. Detroy v. American Guild of Variety Artists, 286 F.2d 75, 79 (2 Cir.) cert. denied 366 U.S. 929, 81 S.Ct. 1650, 6 L.Ed.2d 388 (1961). Congress has thus afforded unions an opportunity for the intra-union disposition of the grievances of members before they can invoke the aid of the Secretary of Labor, and through him the process of the courts."

In the instant case, it is clear that neither alternative was satisfied.

The respondent has consistently maintained that Coffey's alleged internal appeal was from the decision to install Dunaway as Local Chairman (178). That decision was made by letter dated February 7, 1978 (48, 59, 74). Thereafter, the very first communication which could possibly be construed as an appeal by Coffey of the decision to install Dunaway was the letter of February 22, 1978, (48, 60-61, 74-75) over the signature of the recording secretary, purportedly on behalf of the local. If it is assumed, arguendo, that the letter of February 22, 1978, was an appeal by Coffey, three calendar months would not have passed until May 22, 1978. Respondent has alleged that Coffey's complaint with the Secretary of Labor was filed on May 15, 1978 (3, 178). This allegation must be taken as admitted by the respondent for purposes of summary judgment.

It is therefore apparent that Coffey filed his written complaint with the Secretary of Labor prior to the expiration of three months after his initial appeal of the decision to install Dunaway. Nor has respondent made any allegation that Coffey had fully exhausted available remedies. He clearly had not and

was advised of further procedures available by General President Jacobson by letter dated May 3, 1978 (35, 105). In short, Coffey's complaint was clearly premature and was not in compliance with either Section 482(a) (1) or Section 482(a) (2).

Respondent alleged in his complaint that Coffey protested his removal and the installation of Dunaway by letter over the signature of the recording secretary, dated January 16, 1978. However, this assertion is clearly fallacious. The decision allegedly appealed was not made until February 7, 1978 (48, 60, 74). It is a contradiction in terms to state that a decision may be appealed before it has been made.

Respondent's position that the three month period is to be measured from the letter allegedly sent on behalf of petitioner to the International President before the decision to install Dunaway and remove Coffey was made is flatly at variance with the position he has taken, and which has been adopted by the courts, in other cases. For instance, in *Wirtz* v. *H.H. Guy Lodge No. 872, Brotherhood of Railroad Trainmen,* 279 F.Supp. 873 (W.D. Pa. 1967), the Secretary challenged the conduct of an election. The complaining union member, apparently anticipating that a violation would occur, filed a pre-election protest. The union in that case argued that the initial invocation of internal appeals was the pre-election protest. The Secretary, complaining of the conduct of the election, maintained that the initial invocation of internal procedures was the post-election appeal. The court agreed that the protest filed before the challenged election was not to be considered in determining whether the union member had met the requirements of Section 482(a) and held that the pre-election, and hence, pre-violation protest, was of no significance. In other cases in which a violation was alleged with respect to the conduct of the election only post-election, post-violation protests have been considered in determining compliance with 29 U.S.C. Section 482(a) and previolation protests have been disregarded. E.g., *Wirtz* v. *Independent Petroleum Workers,* 307 F.Supp. 462 (N.D. Ind. 1969).

Since the record clearly disclosed that the mandatory requirement of a properly filed complaint by a union member was not met in the instant case, this action should ultimately have been dismissed in accordance with petitioner's affirmative defense that Coffey's complaint was prematurely filed, contained in paragraph V of its first amended answer (145). *Hodgson* v. *United Steelworkers of America,* 459 F.2d 348, 350 (3rd Cir. 1972).

The failure of the courts below to properly deal with the issue points up an important reason why this case should be reviewed and reversed by this Court. In litigation under 29 U.S.C. Sections 481 and 482, the Secretary of Labor, with the assistance of the lower federal courts, has assumed a "Heads I win, tails you lose" posture with respect to compliance with the precedural requirements of 29 U.S.C. Section 482. Thus, if a union member protests a threatened violation of the Act to the union before it occurs and later files a second protest after the alleged violation the Secretary of Labor will, in one case, contend that the three months run from the *second* protest, the post-violation protest. However, in a second case, such as the instant case, the Secretary contends that the three months run from the pre-violation letter rather than from the first appeal filed after the alleged violation. Although the two positions are diametrically opposed, they have one factor in common. In each case, the Secretary arbitrarily selects a date which will make it appear that there has been compliance with Section 482. In fact, the posture of the Secretary indicates a flagrant disregard of Section 482, and because of the lack of guidance from this Court, the Secretary has been successful in getting the lower courts to accept these tortured and inconsistent interpretations of the Act. The intent of Congress that intervention by the Secretary occur only after a full chance to resolve disputes internally, embodied in Section 482, is being ignored. In fact, as evidenced by this case, the Secretary of Labor is involved in these matters long before it is proper under the Statute. The Secretary in the

instant case admitted his investigation was *complete* before Coffey's complaint to the Secretary was filed.

This Court cannot continue to permit the Secretary to ignore Section 482. This Court should provide clear guidance to the Secretary, the unions and the Courts to settle the proper application of this Section. To do otherwise will permit the Secretary to continue to administer this Statute in a fashion which, as to petitioner and other labor organizations, is arbitiary and capricious.

II. The Judgment Entered By The District Court Was Erroneous As A Matter Of Law Because The Court Entered Judgment Without Even Ruling On Relevant And Material Discovery Motions And Without Permitting Completion Of Discovery Which Had Been Agreed To Between The Parties.

The discovery matters involved with respect to this question relate to a defense set forth by petitioner in its amended answer. The facts concerning this defense and the actions of the District Court in this regard are as follows.

Section 402(b) of the Act, 29 U.S.C. Section 482(b), provides that upon receipt of a complaint by a union member, the Secretary of Labor shall investigate the complaint, and if he finds probable cause to believe that the Act has been violated and that the violation has not been remedied, he "shall" bring his civil action within 60 days after the filing of the union member's complaint.

Respondent's civil action was filed on July 14, 1978 (1). The complaint alleged that Coffey's complaint to the Secretary of Labor was filed on May 15, 1978. If that be so, the respondent's civil action was filed on the sixtieth day, the very last day possible. However, petitioner denies that Coffey's complaint was filed May 15, 1978 and contends that it was in fact filed prior to that time (182).

If Coffey's complaint was filed prior to May 15, 1978, as petitioner contends, respondent's civil action was not timely filed, and should be dismissed. This affirmative defense was set forth in paragraph IV of petitioner's first amended answer (144-145).

Coffey's complaint to the Secretary of Labor was dated May 11, 1978, and was addressed to the Secretary of Labor, Washington D.C. (42). The only notation on Coffey's complaint indicating the date of filing is a handwritten notation by compliance officer Sutton indicating receipt on May 15, 1978, at the Department of Labor in Memphis, Tennessee (46). Each and every other piece of correspondence in the record which was directed to the Department of Labor bears a Department of Labor stamp, indicating the date and location of its receipt. (See 119, 129, 132, 133). Further, in answer to interrogatories, respondent states that compliance officer Sutton contacted Coffey on May 11, 1978 (97). These facts were also set forth in petitioner's affidavits in opposition to the Motion for Summary Judgment (182). The affidavits further set forth the petitioner's desire to obtain compliance officer Sutton's deposition (182). Based upon the foregoing, it is obvious that Coffey's complaint was never mailed, but instead was hand-delivered to Sutton on May 11, 1978 and that Sutton simply wrote in the date of May 15. If the complaint had been mailed to Washington, where it was addressed, it obviously would not have been hand receipted by compliance officer Sutton in Memphis, Tennessee. This issue is underscored by respondent's admission that his investigation was fully completed prior to May 15, 1978 (173).

The date of the receipt of the complaint by an officer or agent of the Department of Labor, rather than of its arrival at any particular office, is the date of its filing under Section 482(a). *Wirtz* v. *Local 165, International Hod Carriers,* 246 F.Supp. 741, 750 (D. Nev. 1965); *Schultz* v. *United Steelworkers,* 319 F.Supp. 1172, 1175 (W.D. Pa. 1970).

The 60 day time limit contained in Section 482(b) has not been held to be jurisdictional but rather is considered as

analgous to a statute of limitations. Thus, equitable considerations or principles of waiver may be held to toll the "otherwise mandatory bar" created by the 60 day time limit on the filing of an action by the Secretary. *Hodgson* v. *International Printing Pressmen,* 440 F.2d 1113, 1115 (6th Cir.), *cert. den.,* 404 U.S. 828, 92 S.Ct. 63 (1971).

In the instant case, however, no allegation was or has been made by respondent of any such equitable consideration. Thus, if, as petitioner contends, Coffey's complaint was filed prior to May 15, 1978, the respondent's action is clearly time barred.

As set forth above, the District Court entered summary judgment without ruling upon respondent's Application for Review seeking to compel discovery and without permitting respondent to obtain the depositions of compliance officers Sutton and Kent. Obviously, the deposition of Sutton was of extreme importance to petitioner's contentions concerning the timeless of respondent's complaint in the District Court.

The Application for Review sought to compel respondent to answer certain interrogatories filed on February 21, 1979 (80) and to produce documents requested by petitioner on February 21, 1979 (87). On May 1, 1979, respondent filed numerous objections to various of petitioner's discovery requests (92). Petitioner promptly filed a Motion to Compel answers and production on May 15, 1979 (149). The Motion to Compel was presented to the Magistrate, as required by local rules, on May 31, 1979. The Magistrate entered an order on May 31, 1979 denying the Motion to compel in part, and sustaining it in part (165-166). Petitioner promptly filed its Application for Review of that portion of the order denying production with the District Court on June 7, 1979 (167). By agreement between counsel for respondent and petitioner, the deposition of compliance officers Sutton and Kent which had previously been noticed by petitioner (159, 161), were to be deferred until the District Court ruled on petitioner's Application for Review (182). While peti-

tioner's Application for Review was under submission, respondent filed his Motion for Summary Judgment on August 22, 1979 (176). The District Court ruled on respondent's Motion for Summary Judgment on September 4, 1979 (189), only 13 days after it's filing. By contrast, petitioner's Application for Review, which the Court, under local rules, was to decide on the papers without oral argument, had been pending for almost three months when the Court granted summary judgment. Petitioner's Application for Review was never acted on by the Court.

Rule 56(f) of the Federal Rules of Civil Procedure provides:

> "(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

It is clearly improper to grant summary judgment when the facts are not fully developed. In *Palmer* v. *Chamberlin*, 191 F.2d 532, 540 (5th Cir. 1951), the Court stated:

> "However, before rendering judgment the Court must be satisfied not only that there is no issue as to any material fact, but also that the moving party is entitled to a judgment as a matter of law. Where as in this case, the decision of a question of law by the Court depends upon an inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law."

See also *N.L.R.B.* v. *Smith Industries, Inc.*, 403 F.2d 889, 893 (5th Cir. 1968); *Reeves* v. *City of Jackson*, 532 F.2d 491, 494 (5th Cir. 1976).

It is evident that the deposition of Sutton was important because the details concerning the receipt of Coffey's complaint and the method of recording its receipt are peculiary within the knowledge of Sutton and the Department of Labor. This circumstance, in and of itself, indicates the impropriety of granting summary judgment to respondent without allowing petitioner to complete planned discovery of such facts, peculiarly within the knowledge of the government. *E.g.*, *Slagle* v. *United States*, 228 F.2d 673, 678 (5th Cir. 1956); *Loew's Inc.* v. *Bays*, 209 F.2d 610, 615 (5th Cir. 1954).

The answer of the respondent to this in the Court below was that petitioner had made a serious charge against a governmental offical, and respondent argued, it was not been proven. The foregoing indicates, however, that a substantial issue exists and the deposition of Sutton is essential to its proper resolution. The rejoinder to respondent's argument is found in *Parrish* v. *Board of Commissioners of Alabama State Bar*, 533 F.2d 942, 947 (5th Cir. 1976):

> "In effect, the argument of appellees amounts to a contention that a mere denial of improper conduct by the party against whom discovery is sought is adequate to support a refusal to compel discovery, unless the opposing party is able to counter such denial by specific affidavit. Such a rule would frustrate the discovery process and tend to erect an unreasonably protective shield around parties possessing material relevant and necessary to fair litigation."

The Court went on to hold that grant of summary judgment without permitting a completion of discovery was erroneous. In that case, as in the instant case, the district court had totally failed to exercise his discretion in ruling on a motion to compel discovery. Summary judgment was entered with no ruling having

been made on the discovery motion. See also *Morrison Flying Service* v. *Deming National Bank,* 340 F.2d 430 (10th Cir. 1965).

In the instant case, it is conceded by respondent that the depositions of Sutton and Kent were to be taken after the court's ruling on the Application for Review by agreement of counsel for both parties. Thus, even if the district court denied petitioner's Application for Review, petitioner clearly should have been permitted to proceed with the depositions of the complainace officers before the motion for summary judgment was ruled. The court's action in ruling on the motion for summary judgment before ruling the Application for Review and permitting the taking of the depositions was clear error. Rule 56(f), Federal Rules of Civil Procedure.

III. Petitioner Properly And Uniformly Applied It's Meeting Attendance Rule, As Permitted By The Labor-Management Reporting And Disclosure Act. In So Doing, It In No Manner Violated The Act.

Respondent contended in the Courts below that the facts establish that the Act was violated when Dunaway was installed in office, and Coffey thereby removed, and that this alleged violation affected the outcome of the election. However, examination of the relevant facts omitted from respondent's motion, and contained in petitioner's affidavits in opposition, as well as the relevant regulations and cases, demonstrates that W. R. Dunaway was quite properly declared the newly elected Local Chairman of Lodge 875.

The substantive issues in this case clearly revolve around the question of the eligibility of both R. W. Coffey and W. R. Dunaway for the office of Local Chairman of Lodge 875 under the terms of the subordinate Lodge Constitution which governs the affairs of Lodge 875. Both R. W. Coffey and W. R. Dunaway were nominated for the office of Local Chairman of Lodge 875 at the meeting of the Lodge held in November, 1977. The elections took place in December, 1977, and Coffey received a majority of the votes.

Thereafter, a protest was filed by Dunaway to the International Brotherhood Railway Carmen of the United States and Canada based upon Section 26 of the Subordinate Lodge Consistution. Section 26 provides as follows:

> "Any member who desires to be elected to any office in his lodge, must have attended a majority of the meetings of nis lodge within the twelve months immediately preceding the month of election unless unable to attend for just and sufficient reasons. A member shall be required to advise the recording secretary in a written statement justifying his absence, and this is to be done in the current month; a majority vote of the members in attendance ... to determine acceptance or rejection of the offered excuse."

It should be noted at this point that 29 U.S.C. Section 481(e), the alleged basis of respondent's action, specifically premits imposition of qualifications for eligibility to run for or hold union office.

Local Lodge No. 875 held nine meetings during the twelve months immediately preceding the election. Of these meetings, R. W. Coffey attended only one. That was the meeting at which he was nominated for the office of Local Chairman. R. W. Coffey made no attempt whatsoever to obtain excuses for any of his absences. Therefore, it is clear and undisputed that R. W. Coffey was not qualified to run for or be elected to the office of Local Chairman under the provisions of Section 26.

Accordingly, the International ultimately ordered that W. R. Dunaway, a qualified candidate, be declared the newly elected Local Chairman of Lodge 875, thereby removing Coffey, the unqualified candidate. The petitioner submits that this action was entirely proper, and was consistent with both the constitution of the Brotherhood Railway Carmen and with the Labor Management Reporting and Disclosure Act. Respondent, on the other hand, argues that Dunaway was not qualified under Section 26 either and that Coffey should have been left in office.

The affidavits submitted in the court below clearly indicate that W. R. Dunaway attended four of the nine meetings of Lodge 875 held during the twelve months immediately preceding the election and was absent from two others for just and sufficient reasons as provided for in Section 26, which together total more than a majority of the meetings held. W. R. Dunaway sought to obtain excuses for his non-attendance at the meetings of April and June, 1977. In each case, W. R. Dunaway prepared a written statement justifying his anticipated absence in advance of the meeting in question (185-187). He then delivered the written statement to J. M. Hamilton, President of Local Lodge No. 875, prior to each meeting in question (185-187). Local President Hamilton, in the good faith mistaken belief that he had the authority to approve the excuses as President of the Local Lodge, did not present the written statements to the recording secretary or to the lodge for a vote of membership at the meetings in question (185-187). Rather, Local President Hamilton prepared written notes, over his signature, addressed to W. R. Dunaway in which he advised Dunaway that he had been excused from attendance at each meeting in question (185-187). W. R. Dunaway, since he had turned the written statements over to Local President Hamilton for handling, and since he was not present at the meetings in question, could have properly assumed that the written statements of excuse had been handled in accordance with the provisions of the Constitution.

Thus, in ruling upon the question of the respective qualifications of Dunaway and Coffey, the International considered the fact that W. R. Dunaway had done all which could reasonably be expected of him in order to comply with the provision of Section 26 of the Subordinate Lodge Constitution. Any defects which may be alleged with respect to the handling of the excuses are attributable solely to Local President Hamilton's good faith belief that he had the authority to approve the excuses himself and his failure to handle the same with the membership of the

Lodge. Thus, the International found W. R. Dunaway to be qualified within the meaning of Section 26 of the Subordinate Lodge Constitution and found W. R. Coffey unqualified. Coffey had made no attempt whatsoever to seek any excuses for non-attendance at meetings. In accordance with the interpretation consistently given to Section 26 by the International, the International ordered that W. R. Dunaway be declared the newly elected Local Chairman of Lodge 875 in that he was the only qualified candidate nominated for that office. The only other candidate nominated, R. W. Coffey, was not so qualified. Under the International's consistent interpretation if even one qualified member is nominated to an office, no unqualified member may be nominated or elected.

With the foregoing in mind, the court's attention is invited to the following pertinent regulations promulgated by the Secretary of Labor relevant to the instant dispute. 29 CFR Section 452.3, specifically pertaining to the regulation of elections under the Labor Management Reporting and Disclosure Act, provides as follows:

> "The interpretation consistently placed on a union's constitution by the responsible union official or governing body will be accepted unless the interpretation is clearly unreasonable."

In *Brennan* v. *Employees Independent Association, Pennsylvania Power and Light Company,* 381 F. Supp. 23 (M.D. Pa. 1974), an action under 29 USC Section 481, the same statute which forms the basis of the current action, the court refused to interfere with the union's interpretation of its own constitution, and accordingly denied the Secretary of Labor's motion for summary judgment and granted the union's motion for summary judgment of dismissal. In that case, the court stated:

> "Plaintiff concedes that the standard utilized in judicial review of an interpretation given by a union to its constitution is that an interpretation will be accepted unless that in-

terpretation is clearly unreasonable. 29 CFR 452.3 *English* v. *Cunningham,* 108 U.S. App. D.C. 365, 282 F.2d 848 (1960); *Schonfeld* v. *Raftery,* 359 F. Supp. 380 (S.D.N.Y. 1973). In *Gurton* v. *Arons,* 339 F.2d 371, 375 (2nd Cir. 1964), the court stated: 'The provisions of the LMRDA were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the act.'"

With regard to the reasonableness of the interpretation of Section 26 at issue in the instant case, the court's attention is invited to 29 CFR Section 452.62, another regulation promulgated by the Secretary of Labor pertaining to elections:

> "*Disqualification of Candidates; Procedural Reasons.* A candidate who is otherwise eligible for office may not be disqualified because of the failure of a union officer to perform his duties which are beyond the candidate's control. For example, the failure for a local recording secretary to perform his duty to complete and forward a candidate's nomination certificate to the district may not be used as the basis for disqualifying the candidate."

Parallel reasoning clearly went into the decision to rule W. R. Dunaway qualified. The decision was in accord with the proposition that a candidate should not be penalized for the failure of an officer to follow through in the proper handling of a matter, in this instance, the handling of the written statements of excuses which were given to Local President Hamilton by W. R. Dunaway. This is understood by the fact that one of the absences for which W. R. Dunaway sought an excuse was necessitated by attendance at a union Executive Board meeting

which was required of him in the course of his duties as an officer. Such a reason for absence from a local Lodge meeting is unquestionably just and sufficient within the meaning of Section 26 of the Subordinate Lodge Constitution. Further, W. R. Dunaway's whereabouts on that particular occasion were well known to the members of the local lodge. Under these circumstances, the interpretation of Section 26 by the International is not only reasonable, but is fully consistent with the spirit of the regulations pertaining to eligibility for office promulgated by the Secretary of Labor himself. Significantly, the record contains no evidence whatsoever pertaining to the reason for Coffey's much more numerous absences from Local Lodge meetings. It is undisputed that Coffey attended only one meeting during the twelve months immediately preceding the election. Under these circumstances, it must be presumed that Coffey's absence from all of the other meetings was not due to a just or sufficient reason within the meaning of Section 26.

The Secretary of Labor seeks to avoid the force of the foregoing by contending that a motion was passed in the nomination meeting of November, 1977 that all members in good standing would be permitted to be nominated for and elected to office. That assertion is completely baseless and false. As shown in the affidavits of Local President Hamilton. No such motion was proposed or passed at the meeting of November, 1977. Further, there is absolutely no record of the passage of any such motion. Respondent's contention in the courts below, that a "practice" existed of permitting members to run in good standing notwithstanding Section 26, is also refuted by the affidavit of Local President Hamilton which directly states that no such practice existed in Lodge 875 at the time of these elections and that Section 26 and all other provisions of the Subordinate Lodge Constitution are and always have been fully applicable to the business and affairs of Local Lodge 875.

Thus, W. R. Dunaway was properly installed as the newly elected Local Chairman of Local Lodge 875 as a result of a reasonable interpretation of the provisions of Section 26 of the Subordinate Lodge constitution. That determination should not have been interfered with by the courts below.

CONCLUSION

For all of the foregoing reasons, and upon the aforecited authorities, this Petition of a Writ of Certiorari should be granted.

Respectfully submitted,

C. MARSHALL FRIEDMAN
NEWTON G. McCOY
FRIEDMAN WEITZMAN
& FRIEDMAN, P.C.
The Advocate Building
1133 Pine Street
St. Louis, Missouri 63101
(314) 621-2200
Counsel for Petitioner Local
Lodge No. 875, Brotherhood
Railway Carmen of the
United States and Canada,
ALF-CIO

APPENDIX

APPENDIX A

In the United States Court of Appeals
For the Fifth Circuit

No. 79-3211
Summary Calendar*

Ray Marshall, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

Local Lodge No. 875, Brotherhood Railway Carmen of the United States and Canada, AFL-CIO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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(July 15, 1980)

Before GEE, HENDERSON and HATCHETT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Fed. R. App. P. 34(a); 5th Cir. R. 18.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

In the United States Court of Appeals
For the Fifth Circuit

No. 79-3211

Ray Marshall, Secretary of Labor,
United States Department of Labor

Plaintiff-Appellee,

v.

Local Lodge No. 875, Brotherhood Railway Carmen of the United and Candada, AFL-CIO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING
(Septemer 11, 1980)

Before GEE, HENDERSON, HATCHETT, Circuit Judges
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Entered for the Court:

United States Circuit Judge

APPENDIX C

In the United States District Court
For the Southern District of Mississippi
Jackson Division
Civil Action No. J78-0309(C)

Ray Marshall, Secretary of Labor,
United States Department of Labor
Plaintiff,

v.

Local Lodge No. 875, Brotherhood of Railway Carmen
of the United States and Canada, AFL-CIO
Defendant.

SUMMARY JUDGMENT
(Filed September 4, 1979)

This cause came on to be heard on August 31, 1979, on plaintiff's motion for summary judgment, and the Court being fully advised in the premises finds that plaintiff's motion for summary judgment should be and it is hereby granted.

Defendant is hereby ORDERED to remove W. R. Dunaway from the office of Chairman, Local Protective Board, and to install R. W. Coffey in that office forthwith, Coffey having been elected to tht office in the election held in December, 1977, for a term of three years beginning January, 1978. There should be no further delay in installing Coffey.

Let each party bear its own costs. The Clerk may close the Court file.

ORDERED AND ADJUDGED this 4th day of September, 1979.

William Harold Cox
United States District Judge